No. (1)

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Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), require the grant of state action immunity to private trade associations who engage in unauthorized and unsupervised price fixing, because a state licensing agency later adopted the fixed prices as the reasonable price for its licensees to charge?

2. Did this Court, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), intend to set aside the result of its earlier decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)? Specifically, in the latter case, no immunity from antitrust challenge was given to a system whereby private unsupervised vertically fixed prices were enforced upon third parties by a state agency. The Court of Appeals in this matter, however, held that *City of Columbia* required a grant of immunity to a system of private unauthorized and unsupervised horizontal price fixing because the fixed prices were enforced upon third parties by a state agency.

3. Is the *Midcal* clear articulation element satisfied when a state agency acts in accordance with reasonably foreseeable procedures or should federal courts be required to determine whether the agency's substantive actions were reasonably foreseeable before granting state-action immunity to the agency?

PARTIES TO THE PROCEEDING

Petitioners are all plumbers or plumbing contractors in the State of New Jersey and are residents of the State of New Jersey. At the time of filing of the Complaint all but two of the Petitioners were licensees of the New Jersey Board of Examiners of Master Plumbers. The other two were about to become licensed. The Petitioners were all plaintiffs in the United States District Court and appellants in The United States Court of Appeals for the Third Circuit.

Respondent, the New Jersey Board of Examiners of Master Plumbers (hereinafter referred to as the "Board"), is a New Jersey State administrative agency, authorized by the State Legislature, pursuant to N.J.S.A. 45:14C-1, *et seq.*, to license master plumbers.

Respondent, New Jersey Association of Plumbing, Heating and Cooling Contractors, Inc. (hereinafter referred to as "NJAPHCC"), is a statewide trade association of plumbers and plumbing contractors.

Respondent, Bayshore Association of Plumbing, Heating and Cooling Contractors (hereinafter referred to as "Bayshore") is a local branch of the NJAPHCC.

Respondent, Robert Muller, is a licensed master plumber and a member of the NJAPHCC and Bayshore.

Respondents, Thomas Biondi and Alan Feid were, during periods relevant to the complaint in this matter, presidents of the Board and, at the same time, members of the NJAPHCC.

Each respondent was a defendant in the District Court proceedings and an appellee in the Court of Appeals.

There are no other parties to this action.

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On December 18, 1995, the United States Court of Appeals for the Third Circuit issued its opinion, affirming the decision of the District Court granting the defendants' dismissal and summary judgment motions.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Third Circuit and its judgment of December 18, 1995. A petition for rehearing was timely filed and was denied on January 17, 1996.

Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1 provides:

> **§1. Trusts, etc. in restraint of trade illegal; penalty**
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other

> person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The relevant portions of the State Plumbing License law, N.J.S.A. 45:14C-1, *et seq.*, are found in the Appendix at pages 16-17a.

STATEMENT OF THE CASE

Petitioners, who are licensed master plumbers of the State of New Jersey, subject to the jurisdiction of the Board, brought a complaint in the United States District Court for the District of New Jersey seeking injunctive relief for violations by the Respondents of the Sherman Act, 15 U.S.C. § 1, and the New Jersey Antitrust Act, N.J.S.A. 56:9-1, *et seq.* Petitioners contend that members of the respondent trade associations had long engaged in price fixing discussions at their meetings. It was price fixing that was neither authorized by statute, nor was it actively supervised by any state officials. The complaint further charged that the Board, which enforces a regulation barring excessive pricing by its licensees, adopted the prices and methods of pricing, as fixed by the trade association members, as the reasonable price and pricing methods to be utilized by its licensees.

Upon receipt of the complaint the Respondents moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for summary judgment pursuant to Rule 56. Petitioners responded with a cross motion seeking a preliminary injunction and also submitted a Rule 56(f) affidavit seeking discovery so as to be able, *inter alia,* to test the averments in affidavits submitted by the respondents.

Because there were affidavits with exhibits submitted by both sides outside the pleadings, there is a limited record beyond the pleadings. That record revealed that the Board, twice since 1988, brought well publicized excessive pricing charges against one of the Petitioners herein, Joseph Fichner. On both occasions Mr. Fichner was found to have priced excessively in several instances, and, on the latter occasion in 1994, the fines and costs imposed upon him amounted to $44,844.50.

The Board's excessive pricing regulation, N.J.A.C. 13:32-1.12, lists six criteria for consideration in determining whether a price is, in fact, excessive. One of those criteria is "The price customarily charged in the locality for similar services." The Board's written decision in the Fichner matter reveals it was the only criterion relied upon by the Board.

In both sets of hearings against Mr. Fichner, the Board relied upon the testimony of Robert Muller, a licensed master plumber and member of the NJAPHCC and Bayshore, for proof as to "the price customarily charged."

Mr. Muller testified in the first set of hearings in 1989 that the customary charges to the consumer was at a rate of $35.00 to $45 per hour. Charges were made, moreover, solely on a time and material basis, rather than on a flat fee, *i.e.*, one in which the plumber and consumer agree upon a price in advance.

Muller testified how he knew what the customary prices were:

> By dealing with associations I meet a great deal of plumbers. By a great deal, I mean in the numbers 30, 40, sometimes as much as 50 in this environment when things are going — I might meet 75 different plumbers on a monthly basis.

> You must understand, most plumbers are very social animals, they like to talk and we exchange ideas at these association functions. One of those particular things that are discussed is, for example, "Hey, Bob, what are you getting in your shop" Joe's getting this, so-and-so is getting this, how do you figure you can get that?" These type of conversations. That is how I base my knowledge.
>
> In addition to that, I am very friendly, I know a large portion — I don't know everybody, but I know a large portion of plumbers within our local area, meaning the Matawan area. Most of them are [NJAPHCC] association members anyway, and at various times they'll have a complaint about a bill and they'll come back and they'll converse with me in such a way to say "What do you think? You know, am I out of line?" And we talk and "This is what we get per hour, this is what you get per hour." And we compare notes and, by-golly, we ask a third plumber and this is how I compile my information of the general prevailing wage. Because when the conversation is basically all done, *we pretty much fall into a category.*

(Emphasis added).

Mr. Muller further testified that to corroborate his understanding of the prevailing rates charged, prior to testifying, he had additional discussions with competitor plumbers:

> So I went back, again, talking to different members that we have and different plumbers in the area, "How much are you getting an hour?" was the question pretty much. That's pretty much how it's done, that's it.

Lest there be any question that Mr. Muller merely performed a survey at the behest of the Board strictly for the purpose of testifying, the following colloquy reveals that such price discussions were a regular occurrence:

> Q. Can you give us an idea of how many people you talked to?
>
> A. You must bear with me, I'm going to have to leave this very loose, I don't keep an accurate record as the day goes on. But if I talked to 30 people in the month, if I talked to 25 people in a month, that's approximately how many people I talked to. I have no definitive answer.
>
> Q. All right. And are you testifying that in these conversations you do talk about prices —
>
> A. Absolutely.
>
> Q. — on a regular basis at your meetings?
>
> A. Absolutely.

In support of Petitioners' application for a preliminary injunction, Petitioners presented additional proofs that the trade

associations engaged in surveys of current, rather than historical prices charged by their members and also of the Board's antagonism to flat fee pricing.

In the second Fichner hearing the prosecuting Deputy Attorney General made it clear that Mr. Muller's testimony as to how the trade association members operated was how she and the Board expected all of the Board's licensees to operate. It was their obligation to know and follow the prices charged by competitors in their area:

> MS. BERGER: By the rules and regs, every plumber is required to consider the prices charged by everyone in their general area to determine whether those types of prices are conscionable and within the bounds of consumer protection in determining his own prices. Therefore, every plumber, every master plumber is required to have that information.

The District Court, without analyzing the Petitioners' claim and ignoring the Rule 56(f) application, granted the Respondents' motions for dismissal and summary judgment. The court did so on the basis that an excessive pricing rule is a foreseeable result of the statute creating the Board. The court further found, without explanation, that once the Board was entitled to state action immunity, the trade associations were likewise entitled to grant of their motion.

The District Court's ruling was appealed to the United States Court of Appeals for the Third Circuit. That court affirmed, stating solely:

> After consideration of all contentions raised

> by the parties, we find that the above action is directly controlled by the decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

A motion for rehearing was thereafter timely filed, but was denied by Order dated January 17, 1996, without substantive explanation.

Petitioners now seek the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RECTIFY A RULING BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT THAT THIS COURT'S DECISION IN *CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING, INC.*, 449 U.S. 365 (1991), REQUIRES IMMUNIZATION FROM A SHERMAN ACT LAWSUIT OF PRIVATE PARTIES WHO HAVE ENGAGED IN UNAUTHORIZED AND UNSUPERVISED PRICE FIXING, BECAUSE A STATE LICENSING AGENCY LATER ADOPTED THE FIXED PRICES AS THE REASONABLE PRICE FOR ITS LICENSEES TO CHARGE.

Even if this Court's decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), is applicable to the facts of this case, under the holdings of that opinion the respondent trade associations should not have been granted antitrust immunity. In using *City of Columbia* as a basis for immunizing private, unauthorized and unsupervised price fixing, the Court of Appeals completely misread that case and

"has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).

In *Omni*, the City of Columbia, as well as the allegedly favored billboard company, Columbia Outdoor Advertising Co. (hereinafter referred to as "COA"), were accused of being involved in an anticompetitive conspiracy to restrict the size and location of new billboards, to the detriment of the plaintiff. The plaintiff also charged that COA had engaged in other anticompetitive conduct against it, such as trade libel, use of sales at artificially low rates and inducement to breaches of contract.

The Supreme Court, after finding that the City's actions were authorized by the State, granted state action immunity to both the City and to COA. COA's immunity, however, was limited to its lobbying efforts leading to the adoption of the new ordinance.

Where COA's anticompetitive conduct was independent of the City, there was no state action immunity. As the Court said:

> Under *Parker* and [*Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961)], therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially

> low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 US 19, 29-30 8 L Ed 2d 305, 82 S Ct 1130 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

Id. at 384.

The Court of Appeals in this matter, however, did not distinguish between independent anticompetitive conduct and that intimately connected with state conduct for which immunity was granted.

The Court of Appeal's Judgment Order grants immunity for private anticompetitive conduct, just because, after the fact, the Board chose to adopt the results of that conduct as the reasonable price for its licensees to charge. It is a ruling totally contrary to the proscription in *Omni* against a state "exempt[ing] private action from the scope of the Sherman Act." *Omni* at page 379. It is also completely contrary to the Court's more recent decision in *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992), where it said:

> Our decisions make clear that the purpose of the active supervision inquiry is . . . to determine whether the State has exercised sufficient independent judgment and control

> so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the state has played a substantial role in determining the specifics of economic policy. *The question is not how well state regulation works but whether the anticompetitive scheme is the state's own.*

(Emphasis added). *Id.* at 634.

As a result of the Court of Appeal's Judgment Order, an anticompetitive scheme which is not the state's own has been granted immunity.

It is respectfully requested that this Court rectify that grant of immunity.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THIS COURT, IN *CITY OF COLUMBIA V. OMNI OUTDOOR ADVERTISING, INC.*, 449 U.S. 365 (1991) INTENDED TO SET ASIDE THE RESULT OF ITS EARLIER DECISION IN *CALIFORNIA RETAIL LIQUOR DEALERS ASSN. V. MIDCAL ALUMINUM, INC.*, 445 U.S. 97 (1980). SPECIFICALLY, IN THE LATTER CASE, NO IMMUNITY FROM ANTITRUST CHALLENGE WAS GIVEN TO A SYSTEM WHEREBY PRIVATE UNSUPERVISED VERTICALLY FIXED PRICES WERE ENFORCED UPON THIRD PARTIES BY A STATE AGENCY. THE COURT OF APPEALS IN THIS MATTER, HOWEVER, HELD THAT *CITY OF COLUMBIA* REQUIRED A GRANT OF IMMUNITY TO A SYSTEM OF PRIVATE UNAUTHORIZED AND UNSUPERVISED HORIZONTAL PRICE FIXING BECAUSE THE FIXED PRICES WERE LATER ENFORCED UPON THIRD PARTIES BY A STATE AGENCY.

Petitioners alleged in their complaint that private parties, members of the respondent trade associations, had wrongfully fixed prices for plumbing services. Those prices were fixed without authorization by the state or active supervision by the Board. The Board has simply taken those fixed prices and enforced them upon the Petitioners and other plumbers who were not participants in the price fixing scheme.

Similarly, in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), private entities, manufacturers and wholesalers, vertically fixed the price for the sale of liquor in California. That price fixing was done without the active supervision of the State's Board of Alcoholic Beverage Control. All that Board did was take those fixed prices

and enforce them upon third parties, *i.e.*, wholesalers of alcoholic beverages who did not comply with the fixed price.

The only difference between this case and *Midcal* is that there the price fixing was done pursuant to legislatively authorized fair trade laws. Nevertheless, the State's failure to actively supervise the anticompetitive conduct negated any immunity claim.

Here, while the existence of an excessive pricing rule may have been foreseeably authorized by the State Legislature in enacting a licensing statute, there is no indication in the enabling legislation that the Board's use of that rule to enforce a fixed price upon its licensees was. Certainly, in any event, as with *Midcal*, there was no active supervision of the private entity price fixing in the first instance.

Just as state action immunity was held not to apply in *Midcal*, so too it should have been held not to apply here. Nevertheless, the Court of Appeals held that the ruling in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 449 U.S. 365 (1991), required the grant of state-action immunity in this case.

Omni is factually and legally distinct from *Midcal* and, therefore, this case as well. It should not have controlled the result here.

In both this case and *Midcal* the anticompetitive conduct originated with private parties. In contrast, in *Omni*, the allegedly anticompetitive conduct, enactment of a zoning ordinance, was by an arm of the state. *Omni* did not change the analysis when anticompetitive conduct originated with private parties.

The Court in *Omni* was very clear to say that its opinion was

not to be deemed an exemption for private anticompetitive conduct which associated itself with the government:

> [The Court's ruling] does not mean, of course, that the States may exempt private action from the scope of the Sherman Act; we in no way qualify the well-established principle that a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.

499 U.S. at 379.

The Court's most recent consideration of the scope of state action immunity, *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992) gives no indication that the Court no longer regarded *Midcal* to be valid.

In *Ticor* the Court reaffirmed its pronouncement in *Midcal*, that for a private entity to receive the benefit of state action immunity, its conduct must not only have been the foreseeable result of the actions of the sovereign, but that conduct must also have been actively supervised by the relevant state agency.

Ticor involved a horizontal price fixing claim brought by the Federal Trade Commission against six title insurance companies who did business throughout the country. Their business in four states was in issue. The defendants contended that they were entitled to state action immunity and thus sought dismissal of the charges. They claimed that their rating bureaus which set the rates were licensed by each of the states, were authorized to set rates, and a mechanism for supervising those rates was in place.

The Court rejected the immunity claim, finding that the

active supervision part of the *Midcal* test had not been satisfied because, in practice, the supervisory mechanisms of the states had not functioned.

In reaching that decision the Court both reviewed and reaffirmed *Midcal:*

> *Midcal* confirms that while a state may not confer antitrust immunity on private persons by fiat, it may displace competition with active supervision if the displacement is both intended by the State and implemented in its specific details. *Actual state involvement, not deference to private price fixing arrangements under the general auspices of the law, is the precondition for immunity from federal law.* Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met.

(Emphasis added). 504 U.S. at 633.

While it is clear, certainly, after *Ticor,* that the active supervision standard announced in *Midcal* remains viable, what has not been discussed and what should be considered by this Court is whether the rulings under the facts in *Midcal* also continue as valid precedent. The issue is whether enforcement by a state agency of private unauthorized and unsupervised price fixing against third parties is entitled to state action immunity.

It is an issue which was not considered in *Ticor* because, under the facts in that case, there was no state enforcement of the privately fixed price.

Yet, the Court's pronouncements in *Ticor,* such as that quoted above, reveal a policy whereby courts should not lightly allow a grant of immunity merely because of some involvement by the state with private anticompetitive conduct.

In view of the strong policy standards enunciated in *Ticor,* Petitioners suggest that the decision in *Midcal* on the facts of that case should not have been so readily disposed of through a Judgment Order. Rather, the rulings in *Omni* and in *Midcal* should have been blended.

Petitioners suggest that a view of both cases in light of the policies involved leads to a conclusion that when a state agency acts substantively in producing an anticompetitive policy, it is entitled to the benefits of *Omni,* so long as its conduct was reasonably foreseen by the Legislature. Where, however, the anticompetitive conduct is that of private parties, who are not authorized or supervised by the state in that conduct, state enforcement of that conduct upon third parties does not fit within *Omni's* coverage and no immunity applies.

With such a rule, the principles of *Omni* remain while, at the same time, a state agency is not casting a "gauzy cloak of state involvement over what is essentially a private price fixing arrangement." *Midcal* at page 105.

III.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A STATE AGENCY IS ENTITLED TO STATE-ACTION IMMUNITY MERELY BECAUSE THE PROCEDURES IT FOLLOWS ARE REASONABLY FORESEEABLE BY THE STATE LEGISLATURE OR WHETHER IMMUNITY SHOULD ALSO DEPEND UPON THE REASONABLE FORESEEABILITY OF THE AGENCY'S SUBSTANTIVE ACTIONS AS WELL.

Critical to any determination that this case is controlled by the principles of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), is an initial finding that the conduct by the defendant administrative agency is of the type clearly articulated, or, at least, reasonably foreseen by the state legislature. Only then would both the agency, here the Board, and the private parties who act in concert with it, be eligible for immunity.

The courts below merely assumed that the actions of the Board were within the scope of conduct reasonably foreseen by the Legislature. No analysis was performed.

The District Court merely held that a rule against excessive pricing was reasonably foreseen by the Legislature, but never considered whether use of that rule to enforce a fixed price and to bar flat fee pricing was also reasonably foreseen. The Court of Appeals, in its judgment order, explains nothing with regard to the clear articulation/foreseeability issue.

The subject statute, N.J.S.A.45:14C-1, *et seq.*, is a general licensing statute. No particular authority is given by the Legislature to the Board to regulate fees. While, arguably, a rule against excessive pricing may be encompassed within the scope

of a licensing authority, the use or misuse of that rule to impose particular pricing agreements is not.

The facts herein are different from those in *Omni*. There the City of Columbia, in enacting zoning ordinances, acted wholly within the scope of authority given to it by the Legislature. Once the City's actions were found to be authorized, the Court in *Omni* held that the motives for those actions could not be questioned. Here, on the other hand, the issue is whether the Board acted far beyond the scope of any authority given to it by the state. Petitioners are not questioning motive; they are, rather, questioning whether actions were possibly foreseen by the State Legislature.

In *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992), this Court, in viewing the second part of the test first enunciated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *i.e.*, whether anticompetitive conduct was actively supervised by the state, considered substance over form. Although state mechanisms were in place to supervise the rate setting activities of the defendants, in reality, they did not function. Thus, the defendants were not entitled to immunity.

Here the Court should also look at substance rather than form. It is the anticompetitive conduct which is the subject of the Sherman Act complaint which should be scrutinized to determine whether it was reasonably foreseen by the Legislature —not the form used to accomplish that conduct.

In *Ticor* this Court, after noting the holding in its prior decisions that "state-action immunity is disfavored," 504 U.S. at 636, emphasized the close relation between *Midcal's* two elements. "Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* at 636.

When the courts below fail to analyze whether a state agency's actual conduct was authorized by the Legislature, but only observe the form through which that conduct occurred, they are defeating the policies enunciated by this Court.

Certiorari, therefore, should be granted to clarify how the lower federal courts should analyze state-action immunity claims -that both elements of the *Midcal* test deserve analyses which look to substance, rather than to form.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 17, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5249

ANTOINE NASSIMOS; JOSEPH FICHNER, JR.; MICHAEL CONROY; ANTHONY ROSSI; DANIEL W. WELTMAN; GEORGE STEINER; WILLIAM A. MOORE; WILLIAM TEDESCO; MICHAEL IGNOZZI; ALAN HANZO,

Appellants

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; THOMAS BIONDI; ALAN FEID

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, *Circuit Judges*

Appendix A

SUR PETITION FOR REHEARING IN BANC

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *in banc*, the petition for rehearing is denied.

By the Court,

s/ Jane Roth
Circuit Judge

Dated: JAN 17 1996

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5249

ANTOINE NASSIMOS; JOSEPH FICHNER, JR.; MICHAEL CONROY; ANTHONY ROSSI; DANIEL W. WELTMAN; GEORGE STEINER; WILLIAM A. MOORE; WILLIAM TEDESCO; MICHAEL IGNOZZI; ALAN HANZO,

Appellants

v.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; ROBERT MULLER, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF THE NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; THOMAS BIONDI; ALAN FEID

Appeal from United States District Court
for the District of New Jersey
(D.C. Civil Action No. 94-cv-01319)
(District Judge: Honorable Mary Little Parell)

Argued on December 11, 1995

Before: BECKER, ROTH and LEWIS, *Circuit Judges*

Appendix B

JUDGMENT ORDER

After consideration of all contentions raised by the parties, we find that the above action is directly controlled by the decision in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499, U.S. 365 (1991), and

IT IS ADJUDGED AND ORDERED that the judgment of the District Court entered April 4, 1994, be and is hereby affirmed.

Costs to be taxed against appellants.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: DEC 18 1995

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 31, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 94-1319 (MLP)

ANTOINE NASSIMOS, *et al.*,

Plaintiffs,

v.

BOARD OF EXAMINERS OF MASTER PLUMBERS, THOMAS BIONDI,

Defendants.

MEMORANDUM AND ORDER

PARELL, District Judge

This matter is before the Court on motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller, on motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors, and on application by plaintiffs for a preliminary injunction. For the following reasons, defendants' motions are granted and plaintiffs' application is denied.

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BACKGROUND

Plaintiffs here are master plumbers who are licensed by the New Jersey Board of Examiners of Master Plumbers (the "Board"), a licensing agency for the State of New Jersey, and who conduct business in the state of New Jersey.[1] Plaintiffs allege that defendants[2] conspired to fix prices in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.[3] Plaintiffs assert that the Board, in conspiracy with the other defendants, has enforced N.J.A.C. § 13:32-1.12, which prohibits a licensee of the Board from charging "an excessive price for services," in

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1. Two of the named plaintiffs are not licensed master plumbers but rather allege that they are currently in the process of obtaining such licensure. The Court notes that these two plaintiffs may not have standing to assert the claims in this action; however, since the issue of standing has not been raised by any of the defendants and since the issue is not material to the resolution of this litigation, the Court does not address it.

2. Defendants here are the New Jersey Board of Examiners of Master Plumbers (the "Board"), the New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. ("NJAPHCC"), the Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore"), Thomas Biondi, Alan Feid and Robert Muller.

NJAPHCC and Bayshore are both trade associations. Thomas Biondi and Alan Feid are individuals who have both served as the Chairman of the New Jersey Board of Examiners of Master Plumbers. Robert Muller is an individual who has served as an officer of NJAPHCC and who testified on behalf of the State at a disciplinary hearing against plaintiff Joseph Fichner.

3. Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" is illegal. 15 U.S.C. § 1.

a manner which effectively fixes the prices which may be charged by master plumbers for their services.

N.J.A.C. § 13:32-1.12 provides:

> (a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.
>
> (b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:
>
> 1. The time effort required;
>
> 2. The novelty or difficulty of the job;
>
> 3. The skill required to perform the job properly;
>
> 4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;
>
> 5. The experience, reputation and

ability of the licensee to perform the services; and

6. The price customarily charged in the locality for similar services.

(c) Charging an excessive price shall constitute occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) and may subject the licensee to disciplinary action.

N.J.A.C. § 13:32-1.12.

Specifically, in Count One of the Amended Complaint, plaintiffs allege that the Board has accepted and enforced, as "the price customarily charged in the locality for similar services," the price established by defendants and members of the defendant trade associations. (*See* Am. Compl. at 4-6.) Plaintiffs further allege that they have been forced to charge the fixed prices in order to avoid disciplinary action under N.J.A.C. § 13:32-1.12(c).

The claim of price fixing set forth in Count Two is premised on allegations related to a disciplinary proceeding previously instituted by the Attorney General for the State of New Jersey against plaintiff Joseph Fichner. (*See* Am. Compl. at 6-8.) This Court is familiar with this disciplinary proceeding.[4]

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4. On October 6, 1993, Joseph Fichner filed a complaint with this Court, *Fichner v. Board of Examiners of Master Plumbers*, Civil Action No. 93-4597 (MLP), challenging the constitutionality of N.J.A.C. § 13:32-1.12, which is the (Cont'd)

Appendix C

Based on consumer complaints, the Attorney General for the State of New Jersey filed a disciplinary complaint with the Board on July 30, 1992,[5] alleging that, in seven different consumer transactions for plumbing services between October 6, 1988 and July 2, 1991, Joseph Fichner charged prices which exceeded the usual and customary charges for such work. Hearings were held on the complaint on December 17, 1992, January 14, 1993, February 9, 1993, March 16, 1993 and April 28, 1993. Defendant Thomas Biondi was Chairman of the Board on these dates and presided over the hearings. Defendant Robert Muller testified on behalf of the State as to usual and customary prices charged by plumbers in the relevant locality. Mr. Fichner presented the testimony of Richard DiToma on the issue of pricing. By Final Decision and Order filed August 20, 1993, the Board determined that Fichner had "engaged in unconscionable overpricing of plumbing work performed for seven consumers by charging six consumers more than double the usual and customary rate for such services, and charging the seventh approximately $200.00 in excess of the usual and customary rate." (Ex. B. attached to Compl. filed in Civil Action No. 93-4597 (MLP).)

(Cont'd)
same rule challenged by plaintiffs in the instant action, as this rule was applied against Fichner in the disciplinary proceeding. By Memorandum and Order dated September 27, 1994, this Court granted the defendants' motion to abstain in *Fichner v. Board of Examiners of Master Plumbers*, Civ. Action No. 93-4597 (MLP).

5. This was apparently the second disciplinary complaint filed against Joseph Fichner. A previous complaint had been filed in 1988 which resulted in a reprimand and an order to pay restitution.

Appendix C

DISCUSSION

I. *Motion for Summary Judgment*

The Board, Thomas Biondi, Alan Feid and Robert Muller move for summary judgment on the basis that these defendants are state actors and thus fall within the "state-action exemption" to the federal antitrust laws.

A court shall enter summary judgment under Federal Rule of Civil Procedure 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to defeat a motion for summary judgment, the opposing party must establish that a genuine issue of material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1109 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986). A nonmoving party may not rely on mere allegations; it must present actual evidence that creates a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citing *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)); *Schoch v. First Fidelity Bankcorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. Moreover, "allegations of restraint of trade must be supported by 'significant probative evidence' to overcome a motion for summary judgment." *Bushie v. Stenocord Corp.*, 460 F.2d 116, 120 (9th Cir. 1972) (quoting *First National Bank v. Cities Service, Inc.*, 391 U.S. 253 (1968)).

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The Supreme Court held in *Parker v. Brown*, 317 U.S. 341 (1943) that the Sherman Act was not intended to apply to certain types of governmental action by the states. Thus, the *Parker* court first established the well-settled "state-action exemption" to the federal antitrust laws. The exercise of traditional regulatory functions by the states, including regulation of the practice of licensed professions, e.g., medicine, law, accounting, engineering, architecture, plumbing, etc., is governmental action which qualifies as a "state-action exemption" to the federal antitrust laws. *See Bates v. Arizona State Bar*, 433 U.S. 350, 359-63 and 360 n.11 (1977) (state authority to regulate licensed professions should not be diminished by application of the Sherman Act); *California State Bd. of Optometry v. F.T.C.*, 910 F.2d 976, 982 (D.C. Cir. 1990); *Healey v. Bendick*, 628 F. Supp. 681, 689 (D.R.I. 1986).

Where an entity is designated to serve as the state's administrative adjunct for purposes of regulating a licensed profession, the entity is considered a state agency for purposes of the "state-action exemption" to the federal antitrust laws. *Brazil v. Arkansas Bd. of Dental Examiners*, 593 F. Supp. 1354, 1362-63 (E.D. Ark. 1984), *aff'd*, 759 F.2d 674 (8th Cir. 1985) (citing *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 618 n.2 (6th Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983)). A state agency is presumed to act in the public interest and, in order to come within the "state action exemption," it need only establish that its action is taken pursuant to a clearly articulated and affirmatively expressed state policy. *See Hallie v. Eau Claire*, 471 U.S. 34, 45-47 (1985); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985).

In 1968, the New Jersey Legislature enacted the State Plumbing License law, N.J. Stat. Ann. § 45:14C-1, *et seq.*, which

provides the Board with broad supervisory powers over the practice of plumbing. In order to carry out the responsibilities inherent in this broad vest of supervisory power, the Board is authorized to "adopt, amend and promulgate such rules and regulations which may be necessary to carry out the provisions of [this Act]." N.J. Stat. Ann. § 45:14C-7. The purpose of N.J.A.C. § 13:32-1.12, the rule promulgated by the Board and challenged by plaintiffs, is to protect consumers from being charged unconscionable prices by licensed plumbers and is reflective of the clearly articulated and affirmatively expressed state policy aimed at preventing such wrongful activity by licensed professionals. *See New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 565-66 (1978); *see also American Trial Lawyers Assoc. v. New Jersey Supreme Court*, 66 N.J. 258, 265 (1974); *see generally Kugler v. Romain*, 58 N.J. 522 (1971). Thus, in enforcing the requirement that licensed master plumbers not charge excessive prices, the Board is acting pursuant to a clearly articulated and affirmatively expressed state policy.

Accordingly, it is clear that the Board, Thomas Biondi, Alan Feid and Robert Muller,[6] should be exempt from this suit which is based on an alleged violation of the Sherman Act, and the motion for summary judgment by these defendants shall be

---

6. Defendants Thomas Biondi and Alan Feid are defendants here on the basis that they have both served as Chairman of the New Jersey Board of Examiners of Master Plumbers. Thus, these defendants are sued here only in their capacity as state officials. Robert Muller is a defendant here on the basis that he testified on behalf of the State at the hearings held on the disciplinary complaint filed against plaintiff Joseph Fichner. Thus, for purposes of the "state-action exemption" analysis here, defendant Muller was a state actor when he provided testimony at the request of the State.

granted on this basis. *See Bates v. Arizona State Bar*, 433 U.S. at 361-63.

II. *Motion to Dismiss*

Defendant trade associations, NJAPHCC and Bayshore, move to dismiss plaintiffs' complaint against them. A court may dismiss a complaint pursuant to Rule 12(b)(6) "only if, accepting all well pleaded facts as true, the plaintiff is not entitled to relief." *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). Additionally, all reasonable inferences from plaintiff's allegations "must be accepted as true and viewed in the light most favorable to the non-moving party." *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). This Court may not dismiss a complaint unless plaintiff can prove no set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The crux of plaintiffs' complaint is that the Board, in conspiracy with the defendant trade associations, Biondi, Feid and Muller, has enforced N.J.A.C. § 13:32-1.12 in such a manner as to effectively force plumbers to charge a fixed price for services. The assertion that the rule prohibiting master plumbers from charging excessive and unconscionable prices results in a situation where only "fixed prices" can be charged for plumbing services in order to avoid the threat of disciplinary action by the Board is without merit. There is simply no support for plaintiffs' assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price

customarily charged in the locality for similar services is only on of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. § 13:32-1.12 and since this allegation is without merit, plaintiffs' assertion of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well. Accordingly, the motion to dismiss by defendants NJAPHCC and Bayshore shall be granted.[7]

IT IS therefore on this 31st day of March, 1995, **ORDERED** that the motion for summary judgment by defendants New Jersey Board of Examiners of Master Plumbers, Thomas Biondi, Alan Feid and Robert Muller is hereby **GRANTED**;

IT IS FURTHER ORDERED that the motion to dismiss by defendants New Jersey Association of Plumbing-Heating-Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors is hereby **GRANTED**; and

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7. Plaintiffs have applied to the Court for a preliminary injunction (a) prohibiting the Board from relying upon information provided by the defendant trade associations in determining the reasonableness of fees and (b) prohibiting the Board from enforcing the judgment issued against plaintiff Joseph Fichner. Since this Court herein has resolved the issue set forth in plaintiffs' complaint in favor of defendants, there is no basis upon which to grant plaintiffs' request for injunctive relief. *See Opticians Ass'n of America v. Independent Opticians of America*, 920 F.2d 187, 191-92 (3d Cir. 1990); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 197-98 (3d Cir. 1990); *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982). Accordingly, the application for a preliminary injunction shall be denied.

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IT IS FURTHER ORDERED that the application by plaintiffs for a preliminary injunction is hereby **DENIED**.

s/ Mary Little Parell
MARY LITTLE PARELL
United States District Judge

APPENDIX D — RELEVANT PORTIONS OF NEW JERSEY STATE PLUMBING LICENSE LAW — N.J.S.A. 45:14C-3, 7, 12.3

N.J.S.A. 45:14C-3

45:14C-3. State board of examiners of master plumbers; membership; terms; removal

There is created hereunder a State Board of Examiners of Master Plumbers in the Department of Law and Public Safety, consisting of 7 citizens to be appointed by the Governor, without regard to political affiliation, and except as to members first appointed for terms of 4 years and until the appointment of their successors. Of the members first appointed 2 shall be appointed for terms of 1 year, 2 for 2 years, 2 for 3 years and one for 4 years. Three members shall be master plumbers of at least 10 years experience, one shall be a local plumbing inspector who has held such appointment for at least 10 years, one shall be a journeyman plumber of at least 10 years experience and 2 shall be representatives of the public having no association with the plumbing industry.

No member shall be eligible for appointment for more than 2 terms. Appointments to fill vacancies on the board shall be made for the remainder of the unexpired term.

Members of the board shall be subject to removal by the Governor for cause.

N.J.S.A. 45:14C-7

45:14C-7. Rules and regulations

The State board may adopt, amend and promulgate such rules and regulations which may be necessary to carry out the

provisions of this act; provided, however, that the board's jurisdiction shall not include the regulation or determination of matters relating to trade or craft jurisdiction or the determination of whether any particular class of employee is entitled to perform any particular work.

N.J.S.A. 45:14C-12.3

45:14C-12.3. Master plumbers; licenses required under L.1987, c. 442; additional penalty

a. On or after the effective date of this 1987 amendatory and supplementary act, a person shall not work as a master plumber or use the title or designation of master plumber unless licensed pursuant to the provisions of this amendatory and supplementary act.

b. On or after the effective date of this 1987 amendatory and supplementary act, a person, firm, partnership, corporation or other legal entity shall not engage in the business of plumbing contracting or advertise in any manner as a plumbing contractor or use the title or designation of plumbing contractor unless authorized to act as a plumbing contractor pursuant to the provisions of this amendatory and supplementary act. In addition to any penalty authorized pursuant to the provisions of section 12 of P.L. 1978, c. 73 (C.45:1-25), any person, firm, partnership, corporation or other legal entity which violates nay provision of this subsection shall be guilty of a disorderly persons offense.

APPENDIX E — AMENDED COMPLAINT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MAY 27, 1994

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL CASE NO.

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Plaintiffs,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND

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COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Defendants.

AMENDED COMPLAINT

Plaintiffs, by way of Amended Complaint against the defendants, state as follows:

JURISDICTION AND VENUE

1. This Complaint is brought pursuant to the antitrust laws of the United States, specifically 15 U.S.C. 1, commonly known as the Sherman Act. This Court has jurisdiction over this matter pursuant to 15 U.S.C. 15.

The plaintiffs and defendants all conduct business in this district.

THE PARTIES

1. The majority of the plaintiffs are currently master plumbers who are licensed by the State of New Jersey and conduct their business in this State. Two of the plaintiffs are in the process of obtaining such licensure.

2. Defendant, NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS OF NEW JERSEY (hereinafter referred to as "NJAPHCC"), is a trade association whose membership includes various master plumbers who are licensed by the State of New Jersey and conduct their business in the State of New Jersey. Membership in the NJAPHCC also includes heating and cooling contractors.

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3. Defendant, BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS (hereinafter referred to as "BAYSHORE"), is a trade association whose membership includes various master plumbers and plumbing contractors who do business in Monmouth and Middlesex Counties of New Jersey. It is affiliated with the NJAPHCC.

4. Defendant, ROBERT MULLER (hereinafter referred to as "MULLER"), is a master plumber licensed by the State of New Jersey whose business is located in the Borough of Matawan, County of Monmouth and State of New Jersey. MULLER has been an officer of the NJAPHCC during time periods relevant to this matter.

5. Defendant, BOARD OF EXAMINERS OF MASTER PLUMBERS (hereinafter referred to as the "BOARD"), is an administrative body within the Division of Consumer Affairs of the Department of Law and public Safety of the State of New Jersey. It was created pursuant to N.J.S.A. 45:14C-1, *et seq*.

6. Defendant, THOMAS-BIONDI (hereinafter referred to as "BIONDI"), during the time period relevant to this complaint, has served as Chairman of the Board. He has also been an active member of the NJAPHCC.

7. Defendant, ALAN FEID (hereinafter referred to as "FEID"), during the time period relevant to this complaint, has served as Chairman of the Board. He has also been an active member of the NJAPHCC.

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TRADE AND COMMERCE

This matter involves a claim of price fixing by master plumbers operating in the State of New Jersey. Such master plumbers use or install equipment, parts and supplies which are in interstate trade or commerce. The price fixing conspiracy as alleged has had a substantial effect on such trade or commerce.

OFFENSES CHARGED

COUNT I

1. Defendant, NJAPHCC and several of its affiliated local organizations, including, without limitation, defendant, BAYSHORE, have, for several years, conducted frequent meetings of their members. Among the subjects discussed at such meetings were the prices charged and to be charged to consumers by the associations' members.

2. The purpose and effect of such discussions has been to establish, stabilize, or otherwise fix the prices to be charged by competitor members of the associations to consumers.

3. Such discussions in order to establish, stabilize or otherwise fix prices between competitors constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

4. The majority of the plaintiffs are not members of the NJAPHCC or of any of its affiliated associations and have not participated in the aforesaid price fixing scheme. Two of the plaintiffs are members of the NJAPHCC but have not participated in the price fixing scheme. Ordinarily, thus, each

plaintiff would be free to charge for his services as he determined in his individual discretion.

5. The plaintiffs, nevertheless, have been and are being forced to charge rates as established by the NJAPHCC and its affiliated local organizations by virtue of a Rule established by the BOARD and the actions of the BOARD's members, in particular BIONDI and FEID, in enforcing that Rule.

6. The Rule in question is N.J.A.C. 13:32-1.12, a copy of which is attached hereto as Exhibit "A". That Rule prohibits a licensee of the BOARD from charging excessive prices for his services, with the threat of a charge of occupational misconduct within the meaning of N.J.S.A. 45:1-21(e), should a Rule violation be found. Among the criteria to be followed in determining whether a price charged is excessive is "the price customarily charged in the locality for similar services." N.J.A.C. 13:32-1.12(b)6.

7. The BOARD has accepted and enforced as "the price customarily charged in the locality for similar services" the price as established a aforesaid by members of the NJAPHCC and its local affiliates.

8. Defendants, BIONDI and FEID have used their positions as Chairmen of the Board and active members of the NJAPHCC to have the BOARD use its pricing rule to enforce the fixed price established by the NJAPHCC.

9. The plaintiff master plumbers subject to the BOARD's jurisdiction, have been coerced, under threat to their respective licenses, to adhere to the prices as established by the NJAPHCC

members and those of their local affiliates. As is more specifically referenced in Count II, one plaintiff herein has been severely punished by the BOARD for failing to adhere to the established prices.

10. There is no requirement under the laws of the State of New Jersey which clearly articulates that prices to be charged to consumers by master plumbers are to be set at established rates.

11. The establishment of rates to be charged by master plumbers is not actively supervised by any agency of the State of New Jersey, including the BOARD. The BOARD merely adopts and enforces, without supervision, the rates as established by the NJAPHCC and its local affiliates.

11. Such conduct and procedures constitute a conspiracy in restraint of trade or commerce in violation of 15 U.S.C. 1. The plaintiffs have been and are being damaged in their business or property as a result.

WHEREFORE, plaintiffs demand that this Court enter judgment as follows:

A. Enjoining defendants, NJAPHCC; BAYSHORE, BIONDI and FEID from, directly or indirectly, participating in, encouraging, or facilitating any conduct whereby the prices to be charged by master plumbers are established, stabilized or fixed.

B. Enjoining the BOARD from enforcing N.J.A.C. 13:32-1.12 so long as the method for determining what constitutes excessive plumbing prices are based on rates which are illegally and improperly established, stabilized or fixed.

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C. Awarding the plaintiffs their costs of suit, including reasonable attorneys' fees pursuant to 15 U.S.C. 15(a).

D. Awarding plaintiffs such other and further relief as the Court deems appropriate and in the interest of justice.

COUNT II

1. Plaintiffs repeat and reallege the allegations contained in Count I and make them a part hereof as though more fully set forth at length herein.

2. Plaintiff, JOSEPH FICHNER, JR. (hereinafter referred to as "FICHNER") was heavily fined and otherwise severely punished by the BOARD as a result of his failure to follow the rates as established by members of the NJAPHCC and BAYSHORE at their respective meetings.

3. Defendant, MULLER has testified in hearings against FICHNER both as to his participation at NJAPHCC and BAYSHORE meetings in discussions to establish, stabilize and fix rates and as to what those established, stabilized and fixed rates are.

4. MULLER, thus, both conspired to establish, stabilize and fix the prices to be charged by NJAPHCC and BAYSHORE members, and assisted in applying those set rates to FICHNER through communication to the BOARD.

5. The BOARD thereupon applied the set rates to FICHNER and severely punished him for failing to charge those rates. The BOARD used N.J.A.C. 13:32-1.12 as the purported basis for its complaint against FICHNER.

6. The BOARD's enforcement of the rates as communicated by MULLER had the effect of establishing those rates as the only appropriate rates to be charged by all licensed master plumbers in FICHNER's "locality". Thus, not only FICHNER, but all master plumbers in FICHNER's "locality" have been and are being damaged in their business or property as a result of the aforesaid conduct.

WHEREFORE, plaintiffs demand that this Court enter judgment as follows:

A. Enjoining defendants, NJAPHCC, BAYSHORE, BIONDI and FEID from, directly or indirectly, participating in, encouraging, or facilitating any conduct whereby the prices to be charged by master plumbers or established, stabilized or fixed.

B. Enjoining the BOARD from enforcing N.J.A.C. 13:32-1.12 so long as the method for determining what constitutes excessive plumbing prices is based on rates which are illegally and improperly established, stabilized or fixed.

C. Enjoining MULLER from directly or indirectly participating in conduct to establish, stabilize or fix prices as set forth above.

D. Awarding FICHNER threefold the damage he has incurred as a result of the defendants' conduct.

E. Awarding the plaintiffs their costs of suit, including reasonable attorneys' fees pursuant to 15 U.S.C. 15(a).

F. Awarding plaintiffs such other and further relief as the Court deems appropriate and in the interest of justice.

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EVANS, OSBORNE, KREIZMAN AND BONNEY
Attorneys for Plaintiffs

BY: s/ Joel N. Kreizman
JOEL N. KREIZMAN JNK 9421

DATED: May 26, 1994

Appendix E

ATTACHMENT A

N.J.A.C. 13:32-1.12

13:32-1.12. Professional prices

(a) A licensee of the Board of Examiners of Master Plumbers shall not charge an excessive price for services. A price is excessive when, after review of the facts, a licensee of ordinary prudence would be left with a definite and firm conviction that the price is so high as to be manifestly unconscionable or overreaching under the circumstances.

(b) Factors which may be considered in determining whether a price is excessive include, but are not limited to, the following:

1. The time and effort required;

2. The novelty or difficulty of the job;

3. The skill required to perform the job properly;

4. Any special conditions placed upon the performance of the job by the person or entity for which the work is being performed;

5. The experience, reputation and ability of the licensee to perform the services; and

6. The price customarily charged in the locality for similar services.

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(c) Charging an excessive price shall constitute occupational misconduct within the meaning of N.J.S.A. 45:1-21(e) and may subject the licensee to disciplinary action.